Supreme Court, U.S.
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No. 98-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BRUCE C. BEREANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1987, this Court held that the federal mail fraud statute requires a deprivation of money or property. *McNally v. United States*, 483 U.S. 350 (1987). In response, in 1988, Congress enacted a one-sentence statute that criminalizes, under the mail fraud statute, a "depriv[ation]" of the "intangible right of honest services" of "another." 18 U.S.C. § 1346. This Court has not considered the validity, meaning, or scope of Section 1346.

The questions presented are:

1. Whether 18 U.S.C. § 1346 applies to private contractual relationships.

2. Whether the "intangible right of honest services" in 18 U.S.C. § 1346 must be defined by state law, and if not, whether a defendant nevertheless may offer evidence of the meaning of, and compliance with, pertinent state law.

3. Whether contemplation of harm is a necessary component of mail fraud and an issue for which victim testimony is relevant.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bruce C. Bereano petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The court of appeals' judgment is reported at 161 F.3d 3 (table), and the court of appeals' unpublished opinion is reprinted in the Appendix, App., *infra*, 1a-43a. Pertinent district court opinions also are reprinted, *id.* at 44a-63a.

JURISDICTION

The court of appeals' judgment was entered on August 28, 1998. App., *infra*, 1a. Petitioner's timely petition for rehearing with a suggestion for rehearing *en banc* was denied on October 22, 1998. *Id.* at 64a-65a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 1341 and 1346 of title 18 of the United States Code are reprinted, App., *infra*, 66a.

INTRODUCTION

This case raises fundamental questions concerning the efficacy, meaning, and scope of the "honest services" amendment to the federal mail fraud statute, enacted by Congress in 1988 in response to *McNally v. United States*, 483 U.S. 350 (1987).

Petitioner was prosecuted for depriving "another" of the "right to honest services" in the context of private contractual relationships. The "right" was not defined by state (or federal) law; petitioner was denied the opportunity to establish the meaning of pertinent state law and his compliance with it; and all four of the alleged victims testified that petitioner had rendered outstanding "services," and that they had not been cheated, defrauded, or victimized.

McNally sharply curtailed the expansive use of the mail fraud statute as a means of federal prosecution under an "intangible rights" theory. This Court repudiated the courts of appeals' judge-made "intangible rights" doctrine, and construed the statutory language narrowly, in part to avoid the serious federalism and fair notice problems that would be raised by a broad interpretation. 483 U.S. at 360-61. Congress was required to legislate with greater precision.

McNally, 483 U.S. at 360 ("If Congress desires to go further, it must speak more clearly than it has"; Congress must speak "in clear and definite language").

In 1988, Congress enacted a one-sentence statute in response to *McNally*, which consists, in its entirety, of the following twenty-seven words:

> "For purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."

18 U.S.C. § 1346. This criminal statute does not define the critical phrase "intangible right of honest services." It does not explain which "intangible" rights are protected; does not identify the source of the pertinent "right"; and does not illuminate the category of "services" at issue. It also does not identify the "another" who holds the pertinent "services," or explain the necessary relationship between the defendant and the "another"; nor does it specify the actions that lead to a "depriv[ation]" of the "intangible right."

Resolution of uncertainty by this Court is both necessary and appropriate. Courts of appeals have struggled to interpret the statutory language in attempting to discern its meaning and scope. One important concern involves the application of this statute to private contractual arrangements. *United States v. Frost*, 125 F.3d 346, 365 (6th Cir. 1997) ("[E]nforcement of an intangible right of honest services in the private sector . . . has a much weaker justification" than it does in the public sector), *cert. denied*, 119 S. Ct. 40 (1998); *United States v. Cochran*, 109 F.3d 660, 667 (10th Cir. 1997) ("Assuming without deciding that § 1346 has application where a private actor or quasi-private actor is deprived of honest services in the context of a commercial transaction, it would give us great pause if a

right of honest services is violated by every breach of contract or every misstatement made in the course of dealing."); *United States v. Sun-Diamond Growers of California*, 138 F.3d 961, 973 (D.C. Cir.) ("In the private sector context, § 1346 poses special risks."), *cert. granted on other grounds*, 119 S. Ct. 402 (1998); *United States v. Jain*, 93 F.3d 436, 441-42 (8th Cir. 1996) ("[T]he transition from public to private sector in th[e] context [of § 1346] raises troublesome issues."), *cert. denied*, 117 S. Ct. 2452 (1997).

Courts of appeals likewise have struggled to resolve the appropriate role of state law in Section 1346 prosecutions. Indeed, the courts of appeals are squarely divided over the appropriate role of state law in Section 1346 prosecutions. One court, sitting en banc, has held that a violation of state law is essential in a Section 1346 case because it represents an important constraint on the "intangible right of honest services" crime. *United States v. Brumley*, 116 F.3d 728, 734 (5th Cir. 1997) (*en banc*) (holding that Section 1346 "contemplates that there must first be a breach of a state-owed duty"), *cert. denied*, 118 S. Ct. 625 (1998). Another court — the court of appeals that rendered the decision in this case (App., *infra*, 19a) — has held that Section 1346 does *not* require a violation of state law. *United States v. Bryan*, 58 F.3d 933, 940-41 (4th Cir. 1995); *see also United States v. Sawyer*, 85 F.3d 713, 726 (1st Cir. 1996) (holding that, "[i]n general," Section 1346 does not require a violation of state law, but that, because the parties agreed that the indictment required a state law violation, such a violation had to be proven). In *McNally* itself, moreover, this Court emphasized the importance of state law in an "intangible rights" prosecution. 483 U.S. at 361 n.9.

This case highlights fundamental problems with Section 1346, and vividly illustrates the danger of prosecutorial

overreaching concerning its use. The case involves a federal mail fraud prosecution regarding private contractual relationships. It concerns descriptions in invoices sent by a lobbyist to four of his clients. According to the government, petitioner deprived his clients of their "intangible right of honest services" by describing four $150 charges as "legislative entertainment" when, in fact, the money was used for political contributions. *All* four of the clients — the holders of this "intangible right of honest services" that allegedly was the object of petitioner's "depriv[ation]" — testified at trial that petitioner rendered exemplary services, and that they had not been cheated, defrauded, or victimized. As the district court stated, "[w]e have four clients, all called by the government . . . each of whom says they perceive no fraud, did not then, do not now." JA 996.[1] The district court itself found the alleged fraud "thin" and "obscure," "arguable," and "clearly atypical." *Id.* at 996, 1298, 1337.

The prosecution proceeded, moreover, without any requirement that the "right of honest services" be tethered to a violation of state law. Instead, highlighting the pervasive confusion concerning the appropriate relationship of state law to Section 1346, the government was permitted to introduce evidence of petitioner's supposed *understanding* of state law in an effort to prove his intent, but petitioner was precluded from introducing evidence concerning the actual *meaning* of state law, and his compliance with it.

This case also presents the fundamental issue in mail fraud prosecutions whether contemplation of harm is necessary — an issue that has split the courts of appeals.

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[1] "JA" refers to the Joint Appendix filed in the court of appeals.

App., *infra*, 8a-10a. In addressing this issue, the court of appeals created still another conflict by holding that victims' testimony that they were not harmed is "ultimately *irrelevant*" to that inquiry. *Id.* at 10a (emphasis added).

The questions presented are of substantial and recurring importance, and warrant review by this Court.

STATEMENT OF THE CASE

I. Pre-Trial Proceedings

In May 1994, a grand jury indicted Bruce C. Bereano, a prominent (and sometimes controversial) Maryland lobbyist, on eight counts of mail fraud, in violation of 18 U.S.C. §§ 1341 and 1346. JA 16-28. The indictment's allegations were based on four $150 charges to four of his clients: (1) Phillips Publishing, Inc. ("Phillips"); (2) the Maryland Saltwater Sportfisherman's Association ("MSSA"); (3) the Medical Mutual Liability Insurance Society of Maryland ("Medical Mutual"); and (4) Dental Benefit Providers ("Dental Benefit"). The eight counts consisted of four pairs of related mailings — for each client, one count rested on petitioner's mailing of the bill, and one count rested on the client's payment of the bill. JA 21-28.[2]

According to the indictment, petitioner deprived his clients of "their right to [his] loyal, faithful, honest, and unbiased service" (§ 1346) and of "money and property" (§ 1341). JA 18 ¶ 7. The indictment alleged generally that petitioner asked employees of his firm and family members to make political contributions to his political action

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[2] Although the indictment alleged that petitioner defrauded clients of "approximately $16,000" (JA 20-21 ¶ 18), the eight counts concerned only the $600, and the evidence did not establish more than $600. App., *infra*, 36a.

committee; reimbursed those employees and family members with firm checks that contained false notations as to their true purpose; and billed those reimbursement payments to his lobbying clients, on a pro-rata basis, as "legislative entertainment." *Id.* at 18-20.

The indictment was replete with references to state law. It stated that petitioner was "registered as a lobbyist with the Maryland State Ethics Commission" and was "required to file reports with the Commission" (JA 16 ¶ 2); that a Maryland election law statute "prohibited any individual or corporate entity from contributing in excess of a total of $2,500 to any group of candidates in any primary or general for public office in the state of Maryland and prohibited any individual or corporate entity from contributing in excess of $2,500 to any Maryland state political action committee in any primary or general election" (JA 17-18 ¶ 6); and that, among other things, the scheme enabled petitioner to "conceal the true identities of the actual contributors of campaign funds," "make political contributions in excess of the limitations imposed by Maryland state election law," "cause candidates to file false campaign finance reports, thereby concealing the true identity of the contributor to the candidate's campaign," and "cause his own lobbying activity reports to be false" (*id.* at 20-21 ¶ 18).

Petitioner moved to dismiss the indictment on the ground that it rested on a serious misinterpretation of state election law. JA 43. He also moved to dismiss the Section 1346 charges on the ground that those charges were unconstitutionally vague and that Section 1346 is limited to public officials. *Id.* at 42-43. The district court denied the motion. App., *infra*, 62a-63a. Regarding the state law claim, it agreed with the government that, under controlling Fourth Circuit precedent, no violation of state law is

necessary for a mail fraud prosecution, including Section 1346, and therefore, any misstatement of state election law was irrelevant. *Id.* at 56a-59a. It noted, however, that evidence of petitioner's *understanding* of state election law could be used to prove his intent or motive. *Id.* at 57a. Regarding Section 1346, the court held that the statute had revived pre-*McNally* case law and that its criminal proscriptions extend to private relationships. *Id.* at 53a-55a.

Petitioner subsequently filed a motion to reconsider with regard to the court's ruling on the role of state law. JA 410-17. Petitioner emphasized that a state law violation was a "necessity" in the context of this case. *Id.* at 414. The court denied the motion. *Id.* at 603.

Shortly before trial, the government filed a motion in limine to preclude petitioner from introducing evidence of the actual meaning of state election law and his compliance with it; petitioner opposed this motion. The court ruled for the government, holding again that (1) the actual meaning of state law was not at issue because a violation of state law is not necessary for a mail fraud violation; (2) the government could introduce evidence of petitioner's *understanding* of state law to prove intent or motive; and (3) petitioner could not introduce evidence concerning the actual *meaning* of state law and his compliance with it. App., *infra*, 46a-47a.

II. The Trial

At trial, the government introduced testimony from all four of the clients whose "intangible right of honest services" was at issue — specifically, Stephen Peck of Phillips; Dale Dirks and Richard Novotny of the MSSA; Stephen Carney of Medical Mutual; and Edward Murphy of Dental Benefit. JA 798-983. All of these clients testified that they were entirely satisfied with petitioner's services

and did not consider themselves cheated or harmed.[3] All testified that petitioner had achieved remarkable success in helping to present their views to the legislature — obtaining equitable tax treatment for computerized mailing lists for Phillips (*id.* at 822-23); helping to communicate the need to preserve rockfish from commercial fishing for the MSSA (*id.* at 904-05, 940-41); assisting in tort reform and other legislation for Medical Mutual (*id.* at 870-71); and protecting dental managed care plans from protectionist efforts to curb them for Dental Benefit (*id.* at 951-52). All also testified that petitioner's service was characterized by unselfish commitment and devotion.[4] All further testified that petitioner's duties including assisting them in strategies for political contributions, such as providing lists of suggested contributions.[5]

The government also elicited testimony that the clients' understanding of their contracts with petitioner was that the contract included fees and expenses, and that reimbursements for political contributions were not authorized as "legislative entertainment."[6] All of these witnesses testified that, although they were aware of the government's charges against petitioner, they did not feel in the least bit defrauded or victimized by petitioner's billings. JA 840-41, 880-83, 929-30, 943-46, 977. One individual

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[3] JA 823, 869-70, 895-96, 929, 936, 943-46, 977.

[4] JA 824 ("Bruce has a high passion for his work and his clients."); 895 (describing petitioner's "loyal[ty] to the interest of Medical Mutual" and explaining that "he worked hard" for the organization); 942 (petitioner "taught me a lot"); 951 (petitioner "essentially worked himself out of a job" by his dedication and success).

[5] JA 809, 886, 913-14, 968-69.

[6] JA 817-18, 862-63, 917-18, 970-71.

allegedly deprived of his "right" to honest services — Mr. Carney of Medical Mutual — emphasized that he was so satisfied with petitioner's services that he had just retained him for the coming Maryland legislative session, despite the pending criminal charges and imminent trial. *Id.* at 894-95. Another purported victim — Mr. Novotny of MSSA — characterized the $150 charge as "insignificant," "peanuts," "immaterial," at most an entry in the "wrong column" that did not bother him. *Id.* at 943-44. Mr. Carney of Medical Mutual likewise expressed his view that, in light of "the amount of money involved and the time that has passed since we received this bill," the $150 charge was "just not significant to our operations." *Id.* at 884.

At the close of the government's case, petitioner moved for a judgment of acquittal. JA 984-95. After considering the motion, Judge Nickerson explained that he was deeply troubled by the case, but he decided to submit the case to the jury. *Id.* at 996-98. Judge Nickerson also expressed concern regarding the extent of evidence about state law in light of his rulings that the *meaning* of state law — and petitioner's compliance with it — were not at issue in the case. *Id.* at 997. He ultimately redacted some of the indictment's references to state law. *Id.* at 1037-39. Furthermore, he instructed the jury that a violation of state law was not necessary for a mail fraud violation, and that the jury could convict based on a deprivation of a right of honest services *or* a deprivation of money-or-property. Trial Tr. 1698.

On November 30, 1994, the jury returned a verdict of guilty on all eight counts. JA 1116. The court entered a post-verdict judgment of acquittal on one count because use of the mails had not been proved. *Id.* The court again reiterated that it was troubled by the "unique[ness]" of this

case, and by the "thin and obscure," "relatively slight," and "de minimis" nature of the evidence. *Id.* at 1109-11.

During the sentencing proceeding, all four alleged "victims" submitted letters to the court re-emphasizing that they had not been cheated, defrauded, or victimized, and that petitioner had rendered excellent services. JA 1174-78. Indeed, one of the "victims" continued to retain petitioner even after his convictions. *Id.* at 1175. At sentencing, the court downwardly departed, in part because this was "a clearly atypical fraud case" (*id.* at 1298), and imposed a sentence of community confinement, probation, community service, and a fine. *Id.* at 13-15. The court granted petitioner's motion for a stay of sentence pending appeal, reiterating that this was "a close case" and emphasizing that "whether fraud [is] truly sufficiently defined in the context of a case like this is arguable." *Id.* at 1337.

III. The Court of Appeals' Decision

Petitioner appealed, arguing that Section 1346 does not apply to private relationships and that the statute is unconstitutionally vague. App., *infra*, 13a-18a. He also objected to the district court's resolution of state law issues, and maintained that the court erroneously precluded him from introducing evidence of the actual meaning of state election law and his compliance. *Id.* at 4a, 19a-21a; Pet. C.A. Br. 26-27. He further maintained that mail fraud requires contemplation of harm to victims, and that the testimony of the "victims" squarely precluded such a finding. App., *infra*, 8a-12a.

A divided panel (consisting of two district court judges and one appellate court judge) affirmed. App., *infra*, 2a,

40a-41a.[7] The court concluded that the statute is "not limited to public officials" and "is not too vague to put [petitioner] on notice of the charges he faces." *Id.* at 14a, 17a.

The court then rejected petitioner's arguments concerning state law. It reemphasized its prior holding in *Bryan* that a state law violation is not necessary in a Section 1346 prosecution. App., *infra*, 19a. The court concluded that the admission of the government's evidence regarding petitioner's purported *understanding* of state law was "a close question," but that "any possible error was harmless." *Id.* at 20a-21a. The court did not address petitioner's argument that he had been unfairly denied an opportunity to prove the actual meaning of state law, and his compliance with it. *Id.* at 4a; Pet. C.A. Br. 26-27.

The court recognized a split in the courts of appeal as to whether contemplated harm is necessary, but stated that, even if required, it was present here. App., *infra*, 8a-10a. In reaching this conclusion, the court rejected petitioner's reliance on the victims' testimony that they had not been harmed, and held that "[t]he perception of the victim or target of the scheme is ultimately *irrelevant* to whether [petitioner] devised a scheme, or acted with the requisite intent to defraud." *Id.* at 10a (emphasis added).

The court also rejected petitioner's argument that the district court should have conducted an individualized voir

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[7] The case initially was argued before a different panel of two district judges and one appellate judge (CA Reh. Pet. 3); after one of the district judges died, the case was reargued to a new panel, apparently due to a 1-1 split between the two remaining judges. 4th Cir. I.O.P. 36 ("If a panel is reduced to two and the two cannot agree . . . the case will be reargued before a new three-judge panel.").

dire because of extensive negative publicity about his work as a lobbyist, including his work on behalf of politically unpopular clients such as the tobacco industry. App., *infra*, 28a-31a; *see also* JA 93-220.[8] The court further rejected petitioner's objection that the government impermissibly read grand jury testimony to the jury that had not been admitted into evidence or shown to any witness at trial (*id.* at 6a, 31a-34a); one judge dissented and would have reversed on that ground. *Id.* at 41a-43a.[9]

REASONS FOR GRANTING THE WRIT

The issues presented in this petition — the efficacy, meaning, and scope of the congressional response to *McNally* — are of fundamental and recurring importance to the proper administration of the federal mail fraud statute, a commonly-utilized criminal statute with potentially limitless application. This case, moreover, vividly illustrates the need for this Court to review these issues.

In response to *McNally*, Congress enacted a cryptic, one-sentence statute that criminalizes a scheme to defraud that "deprive[s]" "another" of the "intangible right" of "honest services." Remarkably, Section 1346 — a *criminal* statute — neither defines the "honest services" that are protected, nor identifies the source of the protected "intangible right,"

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[8] The extensive pre-trial publicity about petitioner included coverage of his representation regarding the award of a state lottery contract (JA 162-99), a controversial representation that generated the government's protracted investigation of petitioner (*id.* at 396), but resulted in no charges.

[9] Acting on the government's cross-appeal, the court also reversed the district court's downward departure. App., *infra*, 37a-40a. Subsequently, the district court re-sentenced petitioner to a term of confinement and home detention, followed by probation, and a fine.

nor otherwise explains who is "another" that may be considered a victim of the alleged fraudulent scheme (and a holder of the "intangible right" to the "honest services"). Numerous courts of appeals have expressed concern over the application of this terse and enigmatic statutory language to private contractual arrangements. *See, e.g., Sun-Diamond*, 138 F.3d at 973; *Frost*, 125 F.3d at 365; *Cochran*, 109 F.3d at 667; *Jain*, 93 F.3d at 441-42; *see also* John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 Am. Crim. L. Rev. 427, 430 (1998). In addition, the courts of appeals are sharply divided over the role of state law in prosecutions under Section 1346. *Compare Brumley*, 116 F.3d at 734 *with Bryan*, 58 F.3d at 940-41 *and Sawyer*, 85 F.3d at 726, 731. Review by this Court thus is warranted to clarify these issues and to provide lower courts with much-needed guidance over the scope and meaning of this nebulous statutory language.

Furthermore, the question whether contemplated harm is a requirement is central to mail and wire fraud prosecutions. This issue has generated a split within the courts of appeals. App., *infra*, 9a-10a. The court of appeals' effort to avoid confronting this question by holding "irrelevant" the testimony of the purported victims regarding their lack of harm (*id.* at 10a) itself generates a stark — and equally fundamental — split on a common issue under the mail and wire fraud statutes: the *relevance* of victim testimony regarding harm from an alleged scheme to defraud.

I. THIS COURT SHOULD REVIEW THE APPLICABILITY OF SECTION 1346 TO PRIVATE CONTRACTUAL RELATIONSHIPS.

The extension of Section 1346 to private contractual relationships raises important and unresolved questions that

warrant this Court's review. Courts have emphasized the "special risks" and "troublesome issues" presented by the expansion of Section 1346 beyond the confines of public corruption. *Sun-Diamond*, 138 F.3d at 973; *Jain*, 93 F.3d at 441-42. Such a radical expansion of federal criminal jurisdiction — potentially extending to every private relationship in the United States, based on the prosecutor's perception of a deprivation of the "intangible right of honest services," even if there is no deprivation of money or property — is unwarranted by the statutory language, by settled principles of statutory interpretation, and by the constitutional problems that would result from such an interpretation. At a minimum, the question warrants this Court's review to address a fundamental issue that has led numerous courts of appeals to express concern about the reach of this statute to the private sector. *See, e.g., Sun-Diamond*, 138 F.3d at 973; *Frost*, 125 F.3d at 365; *Cochran*, 109 F.3d at 667; *Jain*, 93 F.3d at 441-42.

This case squarely presents this vitally important threshold issue. The court of appeals upheld the applicability of the "honest services" statute to the private contractual relationships at issue. Indeed, unlike other private sector Section 1346 cases involving employer-employee or corruption-of-employee relationships,[10] this case arises solely in the context of contractual relationships between a lobbyist and four of his clients. The "depriv[ation]" of private "services" at issue, moreover, relates solely to the accuracy and adequacy of the description of individual expense items in invoices to clients who expressed complete satisfaction with the pertinent services.

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[10] *Sun-Diamond*, 138 F.3d at 973; *Frost*, 125 F.3d at 365; *United States v. Gray*, 96 F.3d 769, 772 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 1275 (1997).

1. The statutory language of Section 1346 does not justify the conclusion that Congress authorized federal prosecutors — and federal courts — to monitor private contractual relationships and mete out federal criminal penalties for a perceived "depriv[ation]" of "honest services" to private parties. In *McNally*, this Court emphasized that the applicability of an "intangible rights"/honest services theory to *public officials* required an especially clear statement, in part because of fair notice and federalism concerns. 483 U.S. at 360-61. Applicability of such a theory of federal criminal prosecution to the *private sector* requires, if anything, even greater clarity. This Court repeatedly has emphasized that the regulation of corporate and business relationships primarily is a function of state law. *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 89 (1987). A federal intrusion into areas of traditional state concern, moreover, generally requires a particularly clear statement of congressional intent. *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991).[11] Whatever else can be said about Section 1346 — with its bare references to "another" and an "intangible right of honest services" — it plainly fails to provide such a clear, precise, and explicit statement.

The important differences between public officials and the private sector highlight the need for clarity in applying this federal criminal statute to private sector relationships. Even recognizing the enormous difficulties with the applicability of "honest services" to state and local public officials, *see McNally*, 483 U.S. at 360, the uncertainty and ambiguities are multiplied exponentially in the private

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[11] *See also, e.g., Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786 (1991); *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 91-92 (1984).

sector. The range and variety of private sector relationships — and of the expectations that the parties bring to such relationships — are extremely diverse. *See, e.g., Carpenter v. United States*, 484 U.S. 19, 25 (1987) (noting, in the wake of *McNally*, that a party's "contractual right" to "honest and faithful service" is "too ethereal in itself" to fall within the protection of the mail fraud statute); *United States v. Chestman*, 947 F.2d 551, 567-71 (2d Cir. 1991) (*en banc*), *cert. denied*, 503 U.S. 1004 (1992); Coffee, 35 Am. Crim. L. Rev. at 436-44. Invoking the bludgeon of federal criminal law to regulate, at the federal level, such diverse private relationships throughout the United States is deeply troubling, especially given the vague, amorphous, and open-ended language of Section 1346. Nothing in the statutory language evinces the requisite clarity for such a conclusion.

2. Some courts of appeals, including the court in this case (App., *infra*, 13a-14a), have decided that application of Section 1346 to the private sector is warranted principally because (1) Congress "overturned" *McNally* and "restored" pre-*McNally* case law, and (2) some pre-*McNally* decisions upheld private sector "intangible rights"/honest services prosecutions. *See Bryan*, 58 F.3d at 941-42; *Frost*, 125 F.3d at 370-71. This reliance on pre-*McNally* case law to justify application of Section 1346 to the private sector, however, is inadequate and unavailing.

First, for purposes of criminal liability, it is important to construe the statute that Congress actually enacted. Congress did not pass a statute that said "we hereby revive pre-*McNally* case law." The words that Congress used in Section 1346 matter — they constitute the basis for federal criminal liability — and they must be construed on their own terms.

Second, it is, at the very least, debatable whether Congress has the power simply to "revive" decisions that rested on an erroneous interpretation of the then-existing statute. "[T]here is no federal common law of crimes," *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 181 (1994), and mere congressional restoration of federal judicial interpretations of a prior statute — which this Court has rejected as based on an erroneous interpretation of the then-existing statute — is of questionable validity.

Third, in any event, "restoration" of pre-*McNally* "intangible rights"/honest-services case law fails to provide the necessary congressional clarity; that repudiated body of decisions itself contains hosts of internal conflicts, and would require, if applicable, further decisional refinement. *See, e.g., Brumley*, 116 F.3d at 733 ("[B]efore *McNally*, the doctrine of honest services was not a unified set of rules" and Congress "could not have intended to bless each and every pre-*McNally* lower court 'honest services' opinion").[12]

Fourth, although some pre-*McNally* "intangible rights" decisions concern the private sector, the doctrine principally has been applied to the public sector. Indeed, the case law contains authority expressly limiting the doctrine to abuse of *public office*, including the court of appeals' decision in

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[12] Courts of appeals are divided on the proper role of pre-*McNally* case law. *Compare Frost*, 125 F.3d at 364 ("[Section] 1346 has restored the mail fraud statute to its pre-*McNally* scope, according to previous opinions interpreting the intangible right to honest services.") *with United States v. Sancho*, 157 F.3d 918, 922 (2d Cir. 1998) ("What the government must prove . . . is defined by Section 1346 — not by judicial decisions that sought to interpret the mail and wire fraud statutes prior to the passage of § 1346."); *see also United States v. Bloom*, 149 F.3d 649, 656-57 (7th Cir. 1998) (Section 1346 liability may not extend beyond boundaries established by pre-*McNally* cases).

McNally itself.[13] Under settled principles, conflicts in this prior case law should be resolved in favor of lenity in interpreting the statute (*infra*, p. 21); accordingly, this criminal statute should not be interpreted to apply to the private sector.

3. Even if Section 1346 applies to the private sector, its application in this context is inappropriate. This case arises solely in the context of private contractual relationships, rather than the employer-employee context at issue in three Circuit decisions upholding private sector prosecutions under Section 1346. *Sun-Diamond*, 138 F.3d at 973-74; *Frost*, 125 F.3d at 363-70; *United States v. Gray*, 96 F.3d 769, 777 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 1275 (1997). In addition, this case involves a lobbyist-client relationship in which there is *no* analogous precedent, either before or after *McNally*;[14] and it involves a unique private sector context — petitioning the government and contributing to political campaigns — that is closely regulated by states and suffused with First Amendment

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[13] *See United States v. Gray*, 790 F.2d 1290, 1295 (6th Cir. 1986) ("[M]isconduct of a fiduciary in the administration of exclusively private matters in his capacity as a private individual which does not involve the misuse of public office or public trust, *is not actionable under the mail fraud statute under an intangible rights theory.*") (emphasis added), *rev'd on other grounds sub nom. McNally v. United States*, 483 U.S. 350 (1987).

[14] The only lobbyist case cited by the government below was a pre-*McNally* "intangible rights" prosecution in which the indictment alleged — *not* (as here) that the lobbyist defrauded his *clients* — but rather, that the lobbyist deprived the citizenry of its intangible right "to know who made what political payments to whom." *United States v. Buckley*, 689 F.2d 893, 898 (9th Cir. 1982), *cert. denied*, 460 U.S. 1086 (1983); *see also, e.g., Sawyer*, 85 F.3d at 725-26 (Section 1346 case involving allegations that a lobbyist corrupted state legislators; vacating mail fraud convictions).

concerns (*infra*, p. 27). Accordingly, Section 1346 should not apply in this case.[15]

4. The sparse legislative history, moreover, cannot supply the necessary statutory clarity for this breathtaking expansion of federal criminal power. *See McNally*, 483 U.S. at 360 (requiring "clear and definite language" in the statute); *United States v. Bass*, 404 U.S. 336, 349 (1971) (in enacting criminal legislation, Congress must "convey[] its purpose clearly"). As this Court has stressed in other contexts, legislative history cannot supply plain-statement clarity that is lacking in the statutory text. *See United States v. Nordic Village, Inc.*, 503 U.S. 30, 39 (1992) ("[T]he 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report.").[16]

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[15] The use of a "fiduciary" or "principal-agent" label does not mitigate these concerns. *See, e.g., Chestman*, 947 F.2d at 567-71 (discussing range of fiduciary relationships); *United States v. Margiotta*, 688 F.2d 108, 142 (2d Cir. 1982) (Winter, J., dissenting) (emphasizing "the degree to which fiduciary obligations vary from relationship to relationship"), *cert. denied*, 461 U.S. 913 (1983); App., *infra*, 14a.

[16] Even if legislative history could supply the necessary clarity — which it cannot — it would fail to do so here. There is no pertinent committee report from either the House or the Senate; no hearing in either body considered the language ultimately enacted by Congress (although a hearing on responding to *McNally* was held); and the only contemporaneous legislative comments, which focused largely on public sector corruption, included references only to employer-employee and organizational-leader-to-organization relationships in the private sector — neither of which is apposite here, *see* 134 Cong. Rec. H11,251 (Oct. 21, 1988) (Conyers); *see also* 134 Cong. Rec. S17,376 (Nov. 10, 1988) (Biden) (post-enactment statement). The ultimate statutory language, moreover, was added as a last-minute, close-of-session floor amendment to the "'amendment-ridden' election-year Anti-Drug Abuse Act of 1998," Moohr, *Mail Fraud and the Intangible Rights Doctrine*, 31 Harv. J. on Legis. 153, 169 (1994) — circumstances that weigh against a sweeping statutory interpretation. *See*

(Continued...)

5. To the extent that there is any ambiguity, the rule of lenity requires that the statute be construed so that it does not apply to private sector relationships. *See, e.g., Bass*, 404 U.S. at 347 ("[A]mbiguity concerning the ambit of [a] criminal statute[] should be resolved in favor of lenity."); *Crandon v. United States*, 494 U.S. 152, 158 (1990) (applying this "time-honored interpretive guideline" in construing narrowly a criminal statute).

6. Application of Section 1346 to private sector relationships also would raise serious constitutional concerns. *First*, such an interpretation would violate the fundamental due process principle of fair notice — that "[n]o man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Lanier*, 117 S. Ct. 1219, 1225 (1997); *see also McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.) ("[A] fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.").[17]

Second, such an interpretation would violate core principles of federalism. *McNally*, 483 U.S. at 360 (broad construction of Section 1341 would "leave[] its outer boundaries ambiguous and involve[] the Federal Government in setting standards" governing state and local relationships); *Brumley*, 116 F.3d at 734 (broad reading of Section 1346 threatens to "erode our federalist structure").

(...Continued)
Rewis v. United States, 401 U.S. 808, 812 (1971); *Brumley*, 116 F.3d at 745 (Jolly, J., dissenting).

[17] The "fair warning" requirement also embodies an important separation-of-powers principle: the "deference due to the legislature, which possesses the power to define crimes and their punishment." *Lanier*, 117 S. Ct. at 1225 n.5.

Third, Congress has no authority to impose sweeping federal criminal penalties for *private sector* relationships throughout the nation, based on the tenuous principle of a deprivation of an "intangible right" of private sector "honest services." Congressional authority for the mail fraud statute traditionally has been thought to rest on the Postal Power (Art. I, § 8, cl. 7). *See Badders v. United States*, 240 U.S. 391, 393 (1916); *Ex Parte Jackson*, 96 U.S. 727, 732 (1877). The remote link between the Postal Power and the possible intrusion into every private sector relationship in the nation is simply too attenuated to justify such a radical assertion of congressional power. To the extent that the Commerce Clause (Art. I, § 8, cl. 3) is invoked as a source of authority, that power also is inadequate to justify such a sweeping assertion of federal criminal authority over private sector "honest services" relationships. *See, e.g., United States v. Lopez*, 514 U.S. 549 (1995).[18]

7. As a matter of statutory interpretation, the statute thus should be construed to avoid these constitutional difficulties. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1989). To the extent that Section 1346 nevertheless is construed to apply to the private sector, petitioner's constitutional rights have been violated in this case because petitioner was deprived of fair notice and because Congress lacked power to adopt this far-reaching expansion of federal prosecutorial power.

In sum, the applicability of Section 1346 and the "intangible rights"/honest services doctrine to the private

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[18] The Guarantee Clause (Art. IV, § 4) also was invoked in consideration of Section 1346, *e.g.*, 134 Cong. Rec. at H11,251 (Conyers); that basis, of course, is inapplicable to authority to regulate the *private sector*.

sector has troubled numerous courts of appeals; goes far beyond the use of "intangible rights" prosecutions in the *public sector* that generated this Court's fair notice and federalism concerns in *McNally*; and represents a startling incursion of federal prosecutorial power into private sector relationships on the basis of a perceived "depriv[ation]" of "honest services." The issue warrants review by this Court.[19]

II. THIS COURT SHOULD REVIEW THE ROLE OF STATE LAW IN SECTION 1346 CASES.

The role of state law in Section 1346 prosecutions raises important questions that merit review. Indeed, courts of appeals are sharply divided on the fundamental question whether, in a Section 1346 prosecution, the government must prove a violation of state law establishing and defining such a "right." *Compare Brumley*, 116 F.3d at 734 ("We decide today that services must be owed under state law and that the government must prove in a federal prosecution that they were in fact not delivered.") *with Bryan*, 58 F.3d at 940 ("[T]he fact that a scheme to defraud may or may not violate state law does not determine whether the scheme is within the proscription of the mail fraud statute.") *and* App., *infra*, 20a (same). Even if a state law violation is not required, moreover, an important question is whether a defendant in a Section 1346 prosecution may present evidence of his

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[19] If the Section 1346 basis for petitioner's conviction is legally flawed, petitioner's convictions cannot stand because the jury was charged with the Section 1341 and 1346 theories in the alternative (Trial Tr. 1696, 1698), and a conviction may not rest on an erroneous legal basis. *See, e.g., Sun-Diamond*, 138 F.3d at 972; *United States v. Barona*, 56 F.3d 1087, 1097-98 (9th Cir. 1995), *cert. denied*, 516 U.S. 1092 (1996); *United States v. Tomblin*, 46 F.3d 1369, 1385-86 (5th Cir. 1995); *United States v. Garcia*, 992 F.2d 409, 415-16 (2d Cir. 1993). To the extent that the court of appeals' opinion suggests otherwise (App., *infra*, 18a), that suggestion conflicts with these decisions.

compliance with relevant state law — and the actual meaning of relevant state law — as a defense to the charges.

This case squarely presents these important issues. In conflict with the Fifth Circuit, the court of appeals held that no state law violation was required for a Section 1346 violation. App., *infra*, 19a. This case, moreover, illustrates the need for review regarding the role of relevant state law even in the absence of such a requirement.

1. The requirement of a violation of state law defining a pertinent "right" is a critical limitation on the reach of Section 1346. This constraint is rooted, first, in the statutory language. The statute criminalizes the deprivation of a "*right*." 18 U.S.C. § 1346 (emphasis added). The ordinary meaning of a "right" is a legal entitlement, and the ordinary source for such an entitlement is an external, readily ascertainable body of existing law. The "right" concerns "services," moreover, and the regulation of legal rights-to-"services" ordinarily is governed by state law. *See Brumley*, 116 F.3d at 734 ("[T]he most natural reading" of the "plain language" is that a state law violation is required; court will not "lightly infer" intent to "leave to [federal] courts and prosecutors" the power to define covered "services").

The constraint of a state-law violation is further rooted in the constitutional problems that would result from the failure to require such a violation. These concerns again include (1) fair notice (because, if state law is not the source of the "right" to the "services" at issue, the source of the right is amorphous and undefined); (2) separation-of-powers (because prosecutors and courts, rather than legislatures, would give meaning to the pertinent "right" to "services"); (3) federalism (because state law would be disregarded in determining the "right" to "services" for purposes of federal

criminal prosecutions); and (4) a lack of congressional power and authority for such free-wheeling federal prosecutorial authority. *See generally Brumley,* 116 F.3d at 733-36; Coffee, 35 Am. Crim. L. Rev. at 452-54, 461-65. Accordingly, if the statute is interpreted not to require a state law violation, it would violate these constitutional principles.

Some courts, including the court of appeals in this case (App., *infra*, 19a), have reached the opposite conclusion from *Brumley*, holding that a violation of state law is *not* a necessary component of a Section 1346 prosecution. *Bryan*, 58 F.3d at 940 (rejecting the argument that Section 1346 prosecutions require a violation of state law); *Sawyer*, 85 F.3d at 726, 731. The *Bryan* court, however, rests this conclusion on the mistaken view that Section 1346 simply resuscitated the case law that this Court found erroneous in *McNally*, and that pre-*McNally* case law did not require a state law violation. *Bryan*, 58 F.3d at 940. As discussed, *supra*, pp. 17-19, this reliance on a revival of the repudiated case law should not substitute for a careful explication of the statute enacted by Congress. The statutory text of Section 1346 must control, rather than a general restoration of case law (which had adopted an erroneous interpretation of the then-existing statute).[20]

In *McNally* itself, moreover, this Court emphasized that, "if state law expressly permitted or did not forbid" the "intangible rights" conduct at issue, then "it would take a much clearer indication" in the federal statute that such conduct was "forbidden under federal law." 483 U.S. at 361

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[20] Here too, pre-*McNally* case law includes support for petitioner's position. *See, e.g., United States v. Pisani*, 773 F.2d 397, 409 (2d Cir. 1985) (reversing mail fraud convictions because no state law violation was established). Under principles of lenity (*supra*, p. 21), a state law violation thus is required.

n.9. Section 1346 fails to provide such requisite clarity of intent for the dislodging of state law. Indeed, in rejecting a state law requirement, the Fourth Circuit erroneously dismissed this Court's stated concern in *McNally* as "dicta." *Bryan*, 58 F.3d at 940 n.1. As this Court emphasized in *McNally*, however, congressional intent to override state law defining non-money or property "intangible rights" — by replacing the constraints of relevant state law with the view of federal prosecutors (and courts) regarding the content of the "intangible right of honest services" — requires great clarity (483 U.S. at 361 n.9); Section 1346 fails to provide it.

2. Even if a state law violation is not necessary for a Section 1346 prosecution, the role of state law under Section 1346 warrants review. At the very least, since a purported "intangible right of honest services" is at issue, the defendant must be given an opportunity to prove that his actions complied with relevant state law defining legal "rights" and obligations.

The disturbing treatment of state law in this case demonstrates the rampant confusion about the role of state law in Section 1346 prosecutions. As noted, while the government was permitted to introduce evidence of petitioner's alleged *understanding* of pertinent state law in an effort to show motive and intent, petitioner was precluded from introducing evidence concerning the actual *meaning* of state law and his compliance with it. App., *infra*, 4a, 19a-21a; 46a-47a. A federal statute criminalizing the deprivation of a "right of honest services" cannot fairly be interpreted to authorize such a distorted role for state law in a federal prosecution; at the very least, a defendant charged with deprivation of an intangible "right" must be permitted to establish compliance with a relevant public definition of the

"rights" at issue. A contrary conclusion — as in this case — violates basic principles of fundamental fairness.[21]

3. The requirement of a state law violation, and of an opportunity to establish compliance with state law, is particularly important in this case. The context at issue — limits on political contributions and requirements of lobbyists — involves areas closely regulated by most states (including Maryland). They are freighted with weighty First Amendment concerns. *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (*per curiam*); U.S. Const. amend. I (right "to petition the Government for a redress of grievances"). The notion that this cryptic, twenty-seven word statute authorized federal prosecutors to impose their own notion of protected legal "rights" in this sensitive context — unmoored by the state's official, democratic resolution of these issues — is alarming, and unwarranted by the statutory language.

The role of state law in Section 1346 prosecutions presents a recurring and important question that warrants this Court's review.

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[21] Indeed, the confusion about the role of state law in this case is especially pronounced: (1) although the district court held that petitioner was precluded from introducing evidence of the meaning of state law (App., *infra*, 47a), the prosecutor, in closing argument, specifically argued that petitioner "was violating that law" (JA 1066; App, *infra*, 5a); (2) the only note from a juror during deliberations inquired about the ultimate destination of certain "cash money" — which the juror emphasized "may prove to be very important" and which was raised by the government's evidence regarding petitioner's supposed understanding of state law (*id.* at 1114); and (3) the court acknowledged after trial that "the jurors' attention was perhaps so diverted by the testimony, the evidence with regard to election law violations, that their findings of mail fraud [were] unduly influenced by that." *Id.* at 1109.

III. THIS COURT SHOULD REVIEW THE NECESSITY OF CONTEMPLATED HARM AND THE RELEVANCE OF VICTIM TESTIMONY IN MAIL FRAUD PROSECUTIONS.

This case also raises an important issue in mail fraud prosecutions: whether contemplation of harm is a necessary component of mail fraud, and whether the testimony of alleged victims is relevant to that determination.

The court of appeals acknowledged that "Circuits are split as to whether contemplated harm is necessary." App., *infra*, 9a. As the court explained (*id.* at 9a-10a), a number of Circuits have held that contemplated harm is necessary,[22] while other Circuits have held that contemplated harm is not necessary.[23] The court of appeals noted that, in contrast to the Second Circuit, it had "not held that contemplated harm is necessary in order to establish mail fraud," and that a district court decision (which it affirmed) concluded that contemplated harm was not necessary in the Fourth Circuit. *Id.* at 9a. Nonetheless, the court of appeals sought to evade the acknowledged conflict on this issue, which is critical to this case, by holding that victims' testimony of a lack of harm is "irrelevant" to contemplated harm. App., *infra*, 10a. This determination itself generates a conflict; other courts have emphasized the *relevance* (and importance) of victim testimony in determining whether a requisite contemplation

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[22] App., *infra*, 9a (citing *Cochran*, 109 F.3d at 668; *Jain*, 93 F.3d at 441; *United States v. D'Amato*, 39 F.3d 1249, 1255-57 (2d Cir. 1994); *United States v. Stouffer*, 986 F.2d 916, 922 (5th Cir.), *cert. denied*, 510 U.S. 837 (1993); *United States v. Utz*, 886 F.2d 1148, 1150 (9th Cir. 1989), *cert. denied*, 497 U.S. 1005 (1990)).

[23] App., *infra*, 9a-10a (quoting *Frost*, 125 F.3d at 354 and *United States v. Allard*, 926 F.2d 1237, 1242 (1st Cir. 1991)).

of harm was present. *United States v. D'Amato*, 39 F.3d 1249, 1257 (2d Cir. 1994); App., *infra*, 11a (rejecting *D'Amato* with a "But see" citation).[24]

The court of appeals' invocation of other decisions to support its "irrelevan[ce]" holding, moreover, is unavailing. In fact, the court relied extensively on decisions involving the entirely distinct question (on which the circuits also are split) whether a scheme to defraud should be evaluated in light of the effect on "a person of ordinary prudence and comprehension" or on the "gullible or skeptical. App., *infra*, 10a.[25] To the extent that, as the court of appeals perceived, that issue bears on the "relevance" of victim testimony, that split itself merits review.

Both aspects of this issue — the necessity of contemplated harm and the relevance to that determination of victims' testimony — warrant this Court's review. Both recur with regularity in mail and wire fraud cases; both have received conflicting holdings from the courts of appeals; and, on both, the positions invoked to defeat petitioner's claim — that no contemplated harm is necessary, and that victims' testimony is irrelevant to the determination — are

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[24] Other decisions also have emphasized the *relevance* (and importance) of victims' testimony. *See United States v. Starr*, 816 F.2d 94, 96 (2d Cir. 1987) (reversing mail fraud convictions; alleged victims "testified at trial that they were satisfied with the service that they received"); *United States v. Regent Office Supply*, 421 F.2d 1174, 1182 (2d Cir. 1970) (reversing mail fraud convictions; "[n]o customer [*i.e.*, victim] testified that he felt he had been cheated."); *United States v. Goss*, 650 F.2d 1336, 1343 (5th Cir. Unit A 1981) (relying on victim's testimony concerning loss).

[25] *Compare United States v. Brien*, 617 F.2d 299, 311 (1st Cir.) (scheme covers "gullible or skeptical"), *cert. denied*, 446 U.S. 919 (1980) *and United States v. Maxwell*, 920 F.2d 1028, 1036 (D.C. Cir. 1990) *with United States v. Brown*, 79 F.3d 1550, 1557 (11th Cir. 1996) (rejecting *Brien* and *Maxwell*).

erroneous. Contemplated harm is critical to the threshold question whether there has been a "scheme to defraud." *D'Amato*, 39 F.3d at 1256-57. Victims' testimony that they were not harmed, moreover, must be at least "relevant" to that determination; if not, then basic principles of fairness dictate that victims' testimony likewise is not "relevant" (or even permissible) when the victims perceive harm.

This case presents these questions in a particularly compelling context. Not only did the alleged victims unanimously testify that they were not harmed, but, as the district court emphasized, the goal of serving, rather than harming, the alleged victims is readily apparent.[26] The issues of contemplated harm and the relevance of victims' testimony are undeniably important, and warrant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[26] JA 1297 (district court: "The fraud here was not perpetrated for direct monetary gain to the detriment of the clients involved. *The intent was clearly a mutual enhancement of the lobbying position of both the clients and the defendant*"; it involved "an arguable gain to the clients . . . as part and parcel of the total efforts that were put forth by [petitioner] on their behalf.") (emphasis added).